86 1784

No. _____

In The
Supreme Court of the United States

January Term, 1987

SANFORD COHL and CHARLES GREGORY, SR.,
Petitioners

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED

I.

WHETHER ERROR WAS COMMITTED BY THE DISTRICT COURT'S FAILURE TO GRANT A NEW TRIAL WHEN THE GOVERNMENT WITHHELD *BRADY* MATERIAL UNTIL TRIAL WAS COMPLETE AND JURY DELIBERATIONS HAD BEGUN.

II.

WHETHER ERROR WAS COMMITTED BY THE DISTRICT COURT'S DECISION TO VACATE ITS ORDER GRANTING A NEW TRIAL BASED ON A FINDING THAT IT LACKED JURISDICTION TO GRANT THAT NEW TRIAL.

LIST OF PARTIES

The parties to this cause of action in the Court of Appeals for the Sixth Circuit were as follows:

1. United States of America — Plaintiff
2. Michael Cohl — Defendant
3. Sanford Cohl — Defendant
4. Charles Gregory, Sr. — Defendant

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Statutes

No. _____

In The Supreme Court of the United States

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SANFORD COHL and CHARLES GREGORY, SR.,
Petitioners

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Petitioners, SANFORD COHL and CHARLES GREGORY, SR. respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeal for The Sixth Circuit entered in this proceeding on January 19, 1987.

OPINIONS BELOW

The opinion of the Court of Appeals is unreported.

Rehearing was denied on March 6, 1987.

JURISDICTION

The judgment of the Court of Appeals was entered on January 19, 1987. This petition is being filed within sixty (60) days of that date as required by Supreme Court Rule 20.1. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT OF THE CASE

1. The Petitioners, SANFORD COHL and CHARLES GREGORY, SR., were charged, on September 27, 1984, along with Michael Cohl (brother of Sanford Cohl), Charles Gregory, Jr. (son of Charles Gregory, Sr.), Tony Kabot, Chester Harris, Saul Togal, and Carl Wright, on an 11 count indictment charging one count of conspiracy to commit an offense against the United States contrary to 18 U.S.C. Sec. 371, and ten substantive counts of interstate transportation of stolen property contrary to 18 U.S.C. Sec. 2314. The allegations in this original indictment were that defendants, along with other individuals, stole "stainless steel ingot butts" from the premises of Jones and Laughlin Steel Corporation ("J & L") and transported such in interstate commerce from J & L's plant in Warren, Michigan.

2. On November 19, 1984, a superseding indictment was filed against the same defendants charging one count of conspiracy to commit an offense against the United States contrary to 18 U.S.C. Sec. 371, and nineteen substantive counts of interstate transportation of stolen property contrary to 18 U.S.C. Sec. 2314. The superseding indictment charged allegations of stealing "stainless steel ingot butts" and allegations of stealing "stainless steel ingot butts *and caps*."

3. Charles Gregory, Jr., Tony Kabot and Carl Wright pleaded guilty to the conspiracy ~~count~~, and testified for the government.

4. Saul Togal and Chester Harris were granted judgments of acquittal, pursuant to Fed.R.Crim. P.29(a), at the conclusion of the government's case.

5. Defendants made discovery motions both prior to and during trial, but were not given certain inconsistent oral statements by witness Norman Reese which form the basis for this petition.

6. Testimony at trial developed the following pertinent facts:

a. On October 9, 1978, a contract was signed between J & L and SMC Hauling Co. ("SMC"). SMC was owned, during times pertinent to this case, by Defendants Michael Cohl, Sanford Cohl and Charles Gregory, Sr.

The contract was admitted at trial as the government's Exhibit No. 31. (T. 5/1/85, 82, 185). Under the contract SMC would haul slag and mill refuse from J & L's steel mill to a dump site owned by SMC. SMC received no money for this service but as compensation any stainless steel which SMC picked out of the slag would be offered for sale back to J & L at $125 per ton less than market.

b. Stainless steel was present in slag as a result of the process in which ingots are made. Molten metal spilled from ingot molds or left over when a mold could not be filled were called "caps" or "butts" respectively. (T. 4/30/85, 203-207).

J & L employed a crane operator, a bulldozer operator, and a laborer to remove large pieces of stainless steel from the slag before it was made available to SMC for hauling. (T. 4/30/85, 210).

c. Michael Cohl and Charles Gregory, Sr. allegedly delivered gifts of goods, services, and cash to various J & L employees to induce them to leave large pieces of stainless steel in the slag before SMC removed it.

d. Norman Reese, who had been given immunity in exchange for his testimony, was the government's chief witness.

Reese was the foreman of the Samuel J. Cohl Company ("Cohl Co."). Cohl Co. was owned by the principal defendants and it received the slag SMC hauled and resold the

stainless steel which was recovered from the slag to buyers in Cleveland and Chicago.

Reese testified that he delivered cash from Michael Cohl to the J & L employees who picked the metal before delivery to SMC (Evaristo Nino, Ronald Schmidt and Wallace Gutowski).

After these "bribes" began, SMC started getting larger ingot butts which Reese felt SMC should not legally be taking. (T. 5/21/85, 190-191).

Reese identified government exhibits 33 through 48 as being Cohl Co. invoices and documents pertaining to shipments of stainless steel to buyers in Cleveland and Chicago. (T. 5/22/85, 52-54). Reese testified, based on the documents, the weights listed and his experience, what the loads would have included as to ingot butts or caps. (T. 5/22/85, 66-172).

Reese was specific in saying that caps were not loaded with ingot butts (T. 5/22/85, 169), "they didn't mix the caps with butt ends." (T. 5/22/85, 178).

7. On June 5, 1985, the jury, in the third day of deliberation, sent out a note which percipitated a meeting of counsel in the court room. During the course of an off the record conversation before the court and counsel, Assistant United States Attorney James Genco clearly indicated that Norman Reese had dramatically changed his testimony with respect to the invoices from what he had told the government before trial. These prior statements were not made known to defense counsel prior to or during trial.

8. Defendents Michael Cohl and Charles Gregory, Sr. were convicted by jury verdict on Counts One through Six and Eight through Sixteen of the superseding indictment. Defendant, Sanford Cohl was convicted on Counts One through Three of the superseding indictment.

9. On June 19, 1985, Defendants filed a motion in the district court asking for a new trial based upon the government's failure to provide defense counsel with the pretrial oral statements of Norman Reese.

10. Before the district court heard that motion, this Court rendered its decision in *United States* v *Bagley*, 103 US ____, 105 S Ct 3375, (1985). The district court, as of the hearing was not aware of the *Bagley* decision.

11. After hearing oral argument on July 22, 1985, the district court denied defendant's motion for new trial. A motion for rehearing was not filed.

12. On August 8, 1985, the district court announced that it had reconsidered the motion for new trial after studying the *Bagley* decision and further evaluating the testimony of Norman Reese. An order was entered on August 12, 1985.

13. On August 23, 1985, the government filed a motion for reconsideration and in response Defendants filed a memorandum in opposition.

14. On November 12, 1985, the district court granted reconsideration and vacated its order granting a new trial. The court was persuaded that it did not have jurisdiction on August 8, 1985, to grant the new trial. (App C. 1-4)

15. Petitioner Sanford Cohl was sentenced to a prison term of three years on each count to run concurrently, and to pay a fine of $10,000.00 on each count or a total of $30,000.00.

Petitioner Charles Gregory was sentenced to a prison term of three years on each count run concurrently, and to pay a fine of $10,000.00.

Michael Cohl was sentenced to a prison term of four years on each count to run concurrently, and to pay a fine of $2,000.00 on each count or a total of $30,000.00.

16. The United States Court of Appeals for the Sixth Circuit affirmed Petitioners' convictions in an opinion entered on January 19, 1987. (App D. 1-3).

With respect to the issue involving the government's failure to provide Norman Reese's pre-trial statement, the court of appeals stated:

> "However, as defense counsel concede, this revelation was made in the course of an off-the-record conversation and no attempt was made to preserve the conversation in the record. Furthermore, no effort was made by defense counsel before the jury returned its verdict to either reopen the case, or to have the trial court declare a mistrial. Accordingly, defendants have failed to demonstrate either the error they seek to raise, or the materiality of, or prejudice from, the tardy disclosure. *See, e.g., United States* v *Holloway,* 740 F.2d 1373 (6th Cir.) *cert. denied,* 469 U.S. 1021 (1984).

With respect to the issue involving the right of a trial judge to reconsider a post trial motion before entry of a final judgment, the court of appeals stated:

> "Nor is the issue raised by all defendants, that the district court erred in vacating its *sua sponte* order which had the effect of granting a new trial, well-taken. The district court correctly comprehended its inability to grant a new trial in the absence of a motion from a defendant. *See,* 3 C. Wright, *Federal Practice and Procedure* Sec. 551 (West 1982); Fed. R. Crim. P. 33 advisory committee's note (1966) amendment).

REASONS FOR GRANTING THE PETITION

I.

THE DISTRICT COURT ERRED IN FAILING TO GRANT A NEW TRIAL WHEN THE GOVERNMENT INTENTIONALLY WITHHELD *BRADY* MATERIAL UNTIL TRIAL WAS COMPLETE AND JURY DELIBERATIONS HAD BEGUN.

Witness Norman Reese was arguably the government's chief witness in this cause and he was certainly the key witness in establishing federal jurisdiction.[1] His credability, therefore, was not only in issue but was extremely important to the government's case. Although Reese was extensively cross-examined by defense counsel and possibly impeached on some matters, the verdict of the jury indicates that he was generally believed.

At trial Reese testified that in the interstate shipments of stainless steel, caps and butts were never mixed in any load. (T. 5/22/85, 169, 178). However, during jury deliberations, the government admitted that before trial Reese had told them otherwise. Less than an hour after this revelation the jury returned verdicts of guilty against petitioners.

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[1] Reese was the only witness to testify directly that Petitioner Sanford Cohl *may* have taken part in a conspiracy to bribe J & L employees. While testifying that he himself was a conduit between Michael Cohl and the employees for cash bribes, Reese further testified that on *one* occasion Sanford Cohl called him into the office and handed him an envelope. Sanford Cohl, he testified, said the envelope came from Michael (Cohl) and you (Reese) know what to do with it.

Reese's testimony also established the essence of conspiracy to ship in interstate commerce and, by his identification and explanation of the invoices, he alone could establish that the jurisdictional amount of $5,000.00 (U.S.C. Sec. 2314) had been satisfied.

A motion for new trial based on this conduct was initially denied by the district court, then granted, and ultimately redenied on jurisdictional grounds. The motion, however, should have been granted in the first instance, thereby obviating the need for reconsideration which the district court later held was out of time.

The prior inconsistent statement by Reese to the government had to be revealed to defense counsel in accordance with this Court's decision in *Brady* v *Maryland,* 373 US 83 (1963). Specific requests for *Brady* materials were repeatedly made by defense counsel before and during the trial.[2] In the government's answer in opposition to defendant's motion for new

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[2] Prior to trial, defendants moved for disclosure of impeaching information and evidence favorable to defendant. (R 77) Specifically, defendants asked for the following:

"5. The existence and identification of *each occasion on which the witness has* testified before any court, grand jury, or other tribunal or body or otherwise officially *narrated in relation to* either of the defendants, the investigation, or *the facts of this case.*

"7. *Any and all personnel files for all such witnesses,* the existence and identity of *all federal,* state and local *government files for these witnesses.*

"8. Any and all other records and/or *information* which arguably could be helpful or *useful* to the defense *in impeaching or otherwise detracting from the probative force of the Government's evidence* or which arguably could lead to such records or information, or which is material either to guilt or punishment.

"10. All other *information in the possession* of law enforcement authorities, or *Government counsel, which tend to exculpate* the guilt of the Defendant or *mitigate the degree of the evidence* or reduce the punishment.

"11. Any and all evidence, whether obtained by admission, by FBI surveillance, or through other means, that Norman Reese or other employees of Defendants were diverting to their own use material hauled from Jones and Laughlin.

(footnotes continued on next page)

trial, the government admitted that it was in possession of the prior inconsistent statements before trial.[3]

The district court's decision as to whether to grant a new trial was governed by this Court's decision in *United States* v *Bagley*, 103 US _____, 105 S Ct 3375 (1985). Although the district court, in its one decision which was specifically based

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(footnotes continued from previous page)

"12. The Government has agreed to profide *'Brady'* material as *it* defines same, but does not agree to provide all of the above material. [Emphasis in original]." (Emphasis supplied).

The government, in its answer to defendant's motion

(R 103), responded as follows:

"9. *****the government will provide* copies of *all statements, made by all witnesses interviewed by the government in this case along with the Jencks material.*

"10. In response to paragraph ten, insofar that this request calls for *material properly within the scope of Brady*, such information *will be produced as soon as it becomes apparent to the government. The government is aware of no exculpatory evidence at this time.* As previously stated, *any and all impeachment material will be provided* with *Jencks* material one week prior to trial." (Emphasis added).

On May 22, 1985, during the course of trial and Reese's testimony, defendants again moved for discovery, specifically requesting the following:

"3. All notes of interviews and/or *conversations* with third parties, whether or not government witnesses, taken by IRS Agents Manley, Battani, and Gimni, and *any* other *federal agent*, concerning the Defendants and SMC, Inc., *which tend to exculpate* defendants and/or tend to *contradict the direct testimony of third parties who are witnesses.*" (Emphasis added)

[3] In paragraph 6 of that response the government admitted "...that in two conversations with Norman Reese prior to trial, he indicated that those loads of stainless steel which were the subjects of Counts Four, Five, Six, Eight and Eleven contained, in part or in whole, stainless steel caps. Although FBI Agent Orlin Lucksted was present during those discussions, he made no notes or written report. The information was then incorporated into the Superseding Indictment." (R 169: government's answer in opposition to defendant's motion for new trial, paragraph 6, pp 2-3)

on a consideration of *Bagley*, did grant a new trial, the court reversed itself because that reconsideration came too late. In its first decision the district court denied the motion for a new trial and the Court of Appeals for the Sixth Circuit affirmed that action.

The Sixth Circuit took the position that, under the circumstances, revealing the *Brady* material during jury deliberations was still a timely compliance with *Brady*.

> "However, as defense counsel concede, this revelation was made in the course of an off-the-record conversation and no attempt was made to preserve the conversation in the record. Furthermore, no effort was made by defense counsel before the jury returned its verdict to either reopen the case, or to have the trial court declare a mistrial. Accordingly, defendants have failed to demonstrate either the error they seek to raise, or the materiality of, or prejudice from, the tardy disclosure. *See, e.g., United States* v *Holloway*, 740 F.2d 1373 (6th Cir.), *cert. denied*, 469 U.S. 1021 (1984).

That determination was unreasonable and is in conflict with the decision of several other circuit courts of appeal.

The timeliness of the disclosure of *Brady* material is crucial to compliance with the rule. See *Blake* v *Kemp*, 758 F.2d 523, 532 (11th Cir., 1985); *United States* v *Allain*, 671 F.2d 248, 255 (7th Cir., 1982); *United States* v *Ziperstein*, 601 F.2d 281, 291 (7th Cir., 1979) *cert. denied* 444 U.S. 1031 (1980).

The courts of appeal have either stated or strongly implied that disclosure must be *during* as opposed to *after* trial. *United States* v *Pollack*, 534 F.2d 964 (D.C. Cir., 1976) *cert. denied* 429 U.S. 924 (1976)[4]; *United States* v *Davenport*, 753 F.2d 1460,

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[4] "...disclosure by the government must be made at such time as to allow the defense to use the favorable material effectively in the preparation and presentation of its case." *Pollack*, *supra* at 973.

1462 (9th Cir., 1985)[5]; *United States* v *McKinney*, 758 F.2d 1036, 1049-1050 (5th Cir., 1985)[6]. See also, *United States* v *Flaherty*, 668 F.2d 566, 588-589 (1st Cir., 1981); *United States* v *Higgs*, 713 F.2d 39, 43-44 (3rd Cir., 1983)[7]

The decision of the Sixth Circuit appears to create a conflict among the circuits as to when *Brady* material must be disclosed. The Sixth Circuit however, was also persuaded by the government's argument that even if there was error in not revealing Reese's statements until jury deliberations were in progress, the petitioners, themselves, could have removed the error by requesting the district court to interrupt the jury deliberations by reopening the proofs in this case. At least one circuit has addressed this proposal and refused to accept it. If the Sixth Circuit's opinion in this case is in apparent conflict with the decisions of the First, Third, Fifth, Seventh, Ninth, Eleventh and D.C. Circuits (see argument and footnotes 4 through 7 *supra*), it is in direct conflict with a decision of the Fourth Circuit in *Hamric* v *Bailey*, 386 F.2d 390 (4th Cir. 1967).

The *Hamric* court discussed the possibility of interrupting jury deliberations to present previously withheld *Brady* information. The court was specific in ruling that any disclosure

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[5] "Disclosure, to escape the *Brady* sanction, must be made at a time which would be of value to the accused." *Davenport*, *supra* at 1462.

[6] "...the fact remains that the Government did not supress the evidence. Rather, the Government disclosed it to McKinney during trial." *McKinney*, *supra* at 1049-1050.

[7] "Thus we hold that, assuming the requested information is *Brady* material, appellees due process rights to a fair trial would be satisfied in this case as long as disclosure is made the day that the government witnesses are sheduled to testify in court. See *United States* v *Kopituk*, 690 F.2d 1289, 1338 n 47 (11th Cir. 1982)

after the close of proofs is too late.[8] See also *United States* v *Elmore*, 423 F.2d 775, 779 (4th Cir. 1970).

The Sixth Circuit Court of Appeals erred in refusing to grant a new trial based on the late disclosure of *Brady* material.

II.

THE DISTRICT COURT ERRED IN VACATING ITS ORDER GRANTING A NEW TRIAL BASED ON A FINDING THAT IT LACKED JURISDICTION TO GRANT THAT NEW TRIAL.

A timely motion was presented to the district court by Petitioners, which motion essentially set out the position in Argument I, *supra*. The court denied that motion, but sixteen days later reconsidered the newly decided case of *United States* v *Bagley*, 103 U.S. ____, 105 S Ct 3375 (1985) and the testimony of Norman Reese and decided to grant a new trial. The government filed for reconsideration and the court granted the government's motion and reinstated its order denying new trial. The court was persuaded that it did not have jurisdiction to reconsider its denial in the first instance because Petitioners had not filed a motion for reconsideration. The decision to

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[8] "Finally, on the issue of suppression, we conclude that disclosure of the undisclosed evidence after the jury had retired was too late to overcome the requirements of *Brady*. If it is incumbent on the State to disclose evidence favorable to an accused, manifestly, that disclosure to be effective must be made at a time when the disclosure would be of value to the accused. Possibly the jury deliberations could be interrupted for the purpose of taking additional testimony, but the potential prejudicial effect to an accused of such an extraordinary procedure persuades us that *Brady*, to be given vitality, must be interpreted to require disclosure, at least, before the taking of the accused's evidence is complete." *Hamric*, *supra* at 393.

grant a new trial was made before sentence or entry of a final order of conviction.

There is a surprising scarcity of appellate opinions on the question of a trial court's right to reconsider the denial of a timely filed motion. The government argued that the case was controlled by this Court's decision in *United States* v *Smith*, 331 U.S. 469 (1947).

The *Smith* case, however, is not on point in at least one major characteristic. In *Smith* the lower court reversed its previous order denying a new trial *after* defendant's conviction was affirmed on appeal and defendant was in prison.

Here the district court reversed itself *before* sentence had been imposed, *before* a final order of conviction had been entered, *before* any appeal of the issue had been heard and *before* any petitioner served time in prison. This Court in *Smith* was concerned that decisions in district courts should have finality while the case is on appeal. If not, then the decision by an appellate court would only have an advisory effect on the district court. No language in *Smith*, *supra*, states that a district court, for good reason shown, cannot alter an order before sentence and entry of a final order of conviction. To hold otherwise would allow, as it did in this case, a conviction to stand when the court is persuaded that its confidence in the verdict is undermined and nothing has happened in the interim so that granting a new trial would disrupt the orderly administration of justice.

The government cited numerous federal appellate cases in its brief to the Sixth Circuit Court of Appeals. Yet in each case the trial court was granting relief *sua sponte* — no motion for new trial was made by the defense. The problems, such as double jeopardy, with granting unrequested relief in such instances is obvious. In the instant case, however, the grant of a new trial in response to a timely motion specifically requesting that relief is not only a proper administration of justice but avoids procedural infirmities.

One federal appellate court has discussed the right of the trial court to change its mind on a motion for new trial. The reasoning in this case, *United States* v *Spiegel*, 604 F.2d 961 (5th Cir., 1979), supports the position of Petitioners here.[9]

Since Petitioners had not yet been sentenced and since no final order of conviction had been entered, the trial court had an inherent right to reverse its denial of a motion for new trial. The district court, then, erred in vacating that grant of a new trial based on a lack of jurisdiction to do so. The Sixth Circuit erred in affirming the claim.

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[9] In *Spiegel*, *supra*, the verdicts of "guilty" were returned on August 17, 1974. The trial court allowed defendants extended time to file motions for new trial and the motions were filed on June 11, 1976. New trial was granted on April 14, 1977, based on a recent appellate decision. The government asked for reconsideration when an *en banc* rehearing was granted on the appellate case which the court had relied upon. The trial court granted reconsideration and, when the court of appeals reversed itself *en banc*, reversed its own decision granting a new trial. Essentially, the Fifth Circuit Court of Appeals upheld the action of the trial court because the trial court still had jurisdiction to reconsider its grant of a new trial and reverse itself. The court noted that "[n]o judgment of conviction had been entered up to this time." *Spiegel*, *supra* at 971.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

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DATED: May 4, 1987

NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

January Term, 1987

SANFORD COHL and CHARLES GREGORY, SR.,
Petitioners

vs.

UNITED STATES OF AMERICA,
Respondent.

APPEARANCE OF COUNSEL

Please enter my appearance as counsel for SANFORD COHL, Petitioner in the above-entitled cause. I certify that I am a member of the Bar of the Supreme Court of the United States.

JAMES C. HOWARTH P15179
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Southfield, Michigan 48034
(313) 353-6500

Please enter my appearance as counsel for CHARLES GREGORY, SR., Petitioner in the above-entitled cause. I certify that I am a member of the Bar of the Supreme Court of the United States.

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DATED: May 4, 1987

NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

January Term, 1987

SANFORD COHL and CHARLES GREGORY, Sr.,
Petitioners

vs.

UNITED STATES OF AMERICA,
Respondent.

CERTIFICATE OF SERVICE

JAMES C. HOWARTH, in compliance with Supreme Court Rule 28.4(a) and 28.5(b), does hereby certify that he is a member of the Bar of the Supreme Court, and that on the 4th day of May, 1987, did deposit in the United States mail, with postage fully prepaid, three (3) copies of the Petition for Writ of Certiorari in the above-captioned case, addressed to Solicitor General, Department of Justice, Washington, D.C. 20530.

JAMES C. HOWARTH

Subscribed and sworn to before me this 4th day of May, 1987.

CHARLENE M. BIENENSTOCK
Notary Public
Oakland County, Michigan
My Commission Expires: 6-16-87

NO. _____
IN THE
SUPREME COURT OF THE UNITED STATES

January Term, 1987

SANFORD COHL and CHARLES GREGORY, Sr.,
Petitioners

vs.

UNITED STATES OF AMERICA,
Respondent.

CERTIFICATE OF FILING

JAMES C. HOWARTH and RICHARD M. LUSTIG, in compliance with Supreme Court Rule 28.2, do hereby certify that they are members of the Bar of the Supreme Court, and that on the 4th day of May, 1987, the Petition for Writ of Certiorari in the above-captioned case, addressed to Clerk, Supreme Court of the United States, Washington, D.C. 20543, with first-class postage prepaid, was deposited in a United States mailbox in Southfield, Michigan.

JAMES C. HOWARTH

RICHARD M. LUSTIG

Subscribed and sworn to before me this 4th
day of May, 1987.

CHARLENE M. BIENENSTOCK
Notary Public
Oakland County, Michigan
My Commission Expires: 6-16-87

PETITIONERS' APPENDIX

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,
Plaintiff,

-vs-

MICHAEL COHL. ET. AL.,
Defendants.

CRIMINAL NO.
84-20539

HONORABLE
ANNA DIGGS TAYLOR

ORDER

At a session of the United States District Court at the Federal Building and United States Courthouse, Detroit, Michigan, on Jul 23 1985

PRESENT: HONORABLE ANNA DIGGS TAYLOR
United States District Judge

This matter having come before the Court on defendants' Motion for a New Trial, the Court being duly advised in the premises and finding that there is no reasonable probability that the questioned non-disclosed evidence would have affected the outcome of the trial,

Now therefore, IT IS ORDERED that defendants' motion be and hereby is denied.

/s/ ANNA DIGGS TAYLOR
HONORABLE ANNA DIGGS TAYLOR
United States District Judge

Entered: JUL 23, 1985

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,
Plaintiff,

vs.

MICHAEL COHL, SANFORD COHL, CHARLES GREGARY,
Defendants.

Criminal No. 84 20539

Hon. ANNA DIGGS TAYLOR

ORDER

At a session of said Court held in the Federal Building, Detroit, Michigan, on: AUG 12 1985

Present: Hon. ANNA DIGGS TAYLOR
U. S. DISTRICT JUDGE

This matter having originally come before the Court on the Motion for New Trial filed by Defendants MICHAEL COHL, SANFORD COHL and CHARLES GREGORY, and the Court having denied said motion by Order dated July 23, 1985; and

The Court having reconsidered the issue raised in Defendants' Motion for New Trial *sua sponte*; and

The Court having reconvened the parties in open court on August 8, 1985, for the purposes of stating its decision on reconsideration;

NOW THEREFORE, for the reasons stated on the record in open court on August 8, 1985,

IT IS HEREBY ORDERED that the Court's previous Order denying Defendants' Motion for New Trial is hereby set aside, and that the Defendants' Motion for New Trial be, and the same is hereby granted.

/s/ ANNA DIGGS TAYLOR

UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,
Plaintiff,

v.

MICHAEL COHL, et al.,
Defendants.

CASE NO.
84 20539

HONORABLE
ANNA DIGGS TAYLOR

ORDER GRANTING GOVERNMENT'S MOTION FOR RECONSIDERATION AND VACATING ORDER GRANTING NEW TRIAL

On June 5, 1985, defendants Michael and Stanley [*sic*] Cohl and Charles Gregory, Sr. were convicted of conspiracy to transport stolen property in interstate commerce and multiple counts of transporting stolen property in interstate commerce. On June 19, 1985, after a request for an extension of time to file a motion for new trial was granted, defendants filed a motion for new trial alleging that the government had failed to disclose the substance of an inconsistent oral statement of Norman Reese, the prosecutor's main witness. Federal Rule of Criminal Procedure 33 provides in part that:

> [t]he court on motion for a defendant may grant a new trial to him if required in the interest of justice. . . . A motion for a new trial based on the ground of newly discovered evidence may be made only before or within two years after final judgment, but if an appeal is pending the court may grant the motion only on remand of the case. A motion for new trial based on any other grounds shall be made within 7 days after verdict or finding of guilty or within such further time as the court may fix during the 7-day period.

The prosecution opposed the motion on July 1, 1985 and asserted that the non-disclosure did not deprive defendants of a fair trial and the information would only provide cumulative impeachment material since Reese had been extensively impeached at trial.

On July 22, 1985 the court heard oral argument on defendants' motion and found that the information would not have affected the outcome of the trial. An appropriate order was entered on July 23, 1985.

At the request of the court, counsel for both parties appeared in open court on August 8, 1985. The court advised counsel that it had, since entry of its last order, determined to grant reconsideration of its July 23rd order, based upon *United States v. Bagley*, 105 S.Ct. 3355 (1985), which holds that "suppression of [Brady] evidence amounts to a constitutional violation only if it deprives the defendant of a fair trial . . . and the conviction must be reversed, only if the evidence is material in the sense that its suppression undermines confidence of the outcome of the trial." The court announced its conclusion that the evidence withheld did indeed undermine its confidence that defendants would nevertheless have been convicted, granted defendants' prior motion and ordered a new trial. The order was entered on August 12, 1985.

The prosecution filed this motion for reconsideration of the decision to grant a new trial on August 23, 1985. The prosecution contends that the court erroneously *sua sponte* ordered a new trial. *Sua sponte* orders of new trial are prohibited, it argues. *See United States v. Smith*, 331 U.S. 469, 475 (1947). In addition, the notes of the advisory committee indicate that "[t]he amendments to the first two sentences make it clear that a judge has no power to order a new trial on his own motion, that he can act only in response to a motion timely made by a defendant."

Defendants argue that the government's motion is untimely under Eastern District of Michigan Local Rule 17(k)(l). Rule 17(k)(l) states that "any motion to alter or amend a judgment and any motion for rehearing or reconsideration shall be served no later than 10 days after entry of such judgment or order." Defendants further aver that the court correctly granted a new trial in accordance with the *Bagley* decision. The prosecution's motion is untimely according to the Local Rules. It was filed one day after the time for such a motion had expired.

But, after the time for filing of a defense motion for reconsideration had passed, this court no longer had jurisdiction to even grant a new trial under the Local Rules, and that time had lapsed when the parties met here in open court, on August 8th.

This court is bound by the Local Rules as well as the Federal Rules of Criminal Procedure which "make no provision for rehearing and modifying or setting aside an order entered through mistake." *United States v. Farrah*, 715 F.2d 1097, 1099 (6th Cir. 1983), *quoting United States v. Jerry*, 487 F.2d 600, 604 (3rd Cir. 1973). In *Farrah*, the prosecution filed a petition for rehearing two weeks after the court had permitted the defendant to withdraw his guilty plea because defendant contended that he had not fully understood the penalty he could possibly receive for the offense to which he pleaded guilty. At the conclusion of the hearing on the motion to reconsider, the district court judge reversed his decision to withdraw his plea and reinstated the guilty plea. The *Farrah* court cited *Jerry* and held that the district court did have the authority to reconsider its order and that the court had correctly rescinded its order permitting the defendant to withdraw his plea since the record showed that defendant did understand correctly the length of incarceration he faced.

By analogy, this court holds that it does have the authority to vacate its order of August 12, 1985 and justice requires that this court vacate the order. There is uniform case law that a

court does not have jurisdiction to grant an untimely motion for new trial or a subsequent motion regarding a new trial that is untimely. As the court was without jurisdiction, the order granting the motion was *sua sponte* and such orders are prohibited. *United States v. Smith*, 331 U.S. 469, 475 (1947); *United States v. Mills*, 54 FRD 497, 498 (D.C. Tenn.), *aff'd*, 456 F.2d 1111 (6th Cir. 1972). The notes of the advisory committee which follow Rule 33 of the Federal Rules of Criminal Procedure expressly preclude *sua sponte* orders for new trials. Thus, this court's order of August 12, 1985 is a nullity. *United States v. Green*, 414 F.2d 1174, 1175 (D.D.C. 1969).

IT IS HEREBY ORDERED that for the reasons stated in this order, the court grants the government's motion for reconsideration, vacates its order of August 12, 1985, and reinstates the order of July 23, 1985 which denied defendants' motion for new trial.

IT IS SO ORDERED.

/s/ ANNA DIGGS TAYLOR

ANNA DIGGS TAYLOR
U.S. District Judge

Dated: November 12, 1985

NOT RECOMMENDED FOR PUBLICATION

Nos. 86-1127
86-1128
86-1129

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

MICHAEL COHL (86-1127),
CHARLES GREGORY, SR. (86-1128),
SANFORD COHL (86-1129),
Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN.

Decided and Filed _____

BEFORE: KENNEDY and NORRIS, Circuit Judges; and CONTIE, Senior Circuit Judge.

PER CURIAM. Defendants appeal from their convictions resulting from charges of conspiracy and transportation of stolen goods in interstate commerce. In essence, defendants were charged with participating in a scheme which involved bribing employees of a steel company to furnish defendants with valuable stainless steel ingots and butts, to which they wre not entitled under a slag-hauling contract between the steel company and a hauling company owned and operated by defendants, and then selling that steel in interstate commerce.

All defendants contend that the government's failure to furnish them an alleged inconsistent and exculpatory statement made by a government witness, Norman Reese, entitles them to a new trial, citing *Brady v. Maryland*, 373 U.S. 83 (1963).

Defendants' contention arises out of a conversation they say occurred between defense counsel and government attorneys, while the jury was deliberating, in which the latter advised the former that Reese's testimony, that ingot butts and caps were never mixed in a load, was different from the version of the facts he had given the government and which had served as the basis for the counts of the indictment which detailed mixed loads.

However, as defense counsel concede, this revelation was made in the course of an off-the-record conversation and no attempt was made to preserve the conversation in the record. Furthermore, no effort was made by defense counsel before the jury returned its verdict to either reopen the case, or to have the trial court declare a mistrial. Accordingly, defendants have failed to demonstrate either the error they seek to raise, or the materiality of, or prejudice from, the tardy disclosure. *See, e.g., United States v. Holloway*, 740 F.2d 1373 (6th Cir.), *cert. denied*, 469 U.S. 1021 (1984).

Nor is the issue raised by all defendants, that the district court erred in vacating its *sua sponte* order which had the effect of granting a new trial, well-taken. The district court correctly comprehended its inability to grant a new trial in the absence of a motion from a defendant. *See* 3 C. Wright, *Federal Practice and Procedure* § 551 (West 1982); Fed. R. Crim. P. 33 advisory committee's note (1966 amendment).

Defendant Sanford Cohl contends that the trial court erred in overruling his motion for judgment of acquittal, as there was insufficient evidence of guilt to sustain a conviction on the charges against him.

> In testing the sufficiency of the evidence to withstand a motion for judgment of acquittal, the trial judge does not pass upon the credibility of the witnesses or the weight of the evidence. On the contrary, he must view the evidence

> and the inferences that may justifiably be drawn therefrom in the light most favorable to the Government. If, under such view of the evidence he concludes that a reasonable mind might fairly conclude guilt beyond a reasonable doubt, the motion should be overruled and the issue left to the jury. It is only where under such view of the evidence he concludes there must be such a doubt in a reasonable mind, should the motion be granted. (Citations omitted.)

United States v. Conti, 339 F.2d 10, 13 (6th Cir. 1964).

In reviewing the denial of a motion for judgment of acquittal, the test to be applied by this court is whether reasonable minds could reach different conclusions on the issue of whether the defendant was guilty beyond a reasonable doubt. In other words, it is only where reasonable minds could not fail to find reasonable doubt that a reviewing court may reverse the district court's denial of the motion.

In view of the testimony of Norman Reese concerning Sanford Cohl's direct involvement in the scheme and of his knowledge of business transactions, other evidence that Cohl was present during contract negotiations and was involved in the day-to-day operation of companies which dealt with the shipments, and the inferences of guilt which reasonably may be drawn from that evidence, we are unable to say that reasonable minds could not find Sanford Cohl guilty beyond a reasonable doubt.

Accordingly, the judgments are affirmed.

No. 86-1127/8/9

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

MICHAEL COHL (86-1127),
CHARLES GREGORY, SR. (86-1128),
SANFORD COHL (86-1129),
Defendants-Appellants

ORDER

BEFORE: KENNEDY and NORRIS, Circuit Judges, and CONTIE, Senior Circuit Judge

The Court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this Court, and no judge of this Court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ JOHN HEHMAN

John P. Hehman, Clerk

Nos. 86-1784 and 86-1785

In the Supreme Court of the United States

OCTOBER TERM, 1987

SANFORD COHL AND CHARLES GREGORY, SR.,
PETITIONERS

v.

UNITED STATES OF AMERICA

MICHAEL COHL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the government's delayed disclosure of alleged *Brady* material entitles petitioners to a new trial.

2. Whether the district court properly vacated its sua sponte order granting petitioners a new trial.

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OCTOBER TERM, 1987

No. 86-1784

SANFORD COHL AND CHARLES GREGORY, SR., PETITIONERS

v.

UNITED STATES OF AMERICA

No. 86-1785

MICHAEL COHL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. D1-D3)[1] is reported at 812 F.2d 1408 (Table).

[1] "Pet. App." refers to the appendix to the petition for a writ or certiorari in No. 86-1784.

JURISDICTION

The judgment of the court of appeals was entered on January 19, 1987. A petition for rehearing was denied on March 6, 1987 (Pet. App. E1). The petition for a writ of certiorari in No. 86-1784 was filed on May 4, 1987, and the petition in No. 86-1785 was filed on May 5, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Eastern District of Michigan, petitioners Michael Cohl and Charles Gregory, Sr., were convicted on 14 counts of interstate transportation of stolen property, in violation of 18 U.S.C. 2314. Petitioner Sanford Cohl was convicted on two counts of that offense. Each petitioner was also convicted of conspiracy, in violation of 18 U.S.C. 371. Michael Cohl was sentenced to concurrent four-year terms of imprisonment on each count, and Gregory and Sanford Cohl were sentenced to concurrent three-year terms of imprisonment on each count. In addition, Michael and Sanford Cohl were each fined a total of $30,000, and Gregory was fined $10,000. The court of appeals affirmed in a per curiam opinion (Pet. App. D1-D3).

1. The evidence at trial showed that petitioners owned and operated SMC Hauling Company. On October 9, 1978, SMC entered into a contract with Jones & Laughlin Steel Corporation whereby SMC agreed to haul away slag from Jones & Laughlin's steel mill. In return, SMC was entitled to remove stainless steel from the slag and to sell it, subject to Jones & Laughlin's right of first refusal (2 Tr. 198-203). Under

the contract, stainless steel ingot "butts"—residual metal from partially filled ingot molds—were not to be removed from the plant. Stainless steel "caps"—residual metal recovered from the molten slag—could be removed if they were not first picked out by designated Jones & Laughlin employees, who received incentive pay to recover steel from the slag (2 Tr. 77; 3 Tr. 22-23; 7 Tr. 65). Large caps, which were almost as valuable as ingot butts and which could be easily seen in and picked from the slag, were expected to be reclaimed by the Jones & Laughlin employees, not by SMC (2 Tr. 86, 116, 202-208; 3 Tr. 19, 22-23, 50).

From late 1977 to 1982, SMC made payments to various Jones & Laughlin employees who, in turn, left butts and large caps in the slag for SMC to remove (*e.g.*, 3 Tr. 116-120; 4 Tr. 106-108, 110-117, 119-120, 128; 7 Tr. 74-77). To conceal the resulting thefts, SMC offered few, if any, of the large pieces of steel for sale to Jones & Laughlin, despite the latter's right of first refusal under the contract (2 Tr. 86; 4 Tr. 252-253; 8 Tr. 133-134). Instead, petitioners sold the stolen ingot butts and large caps to out-of-state companies through other companies owned by petitioners (6 Tr. 41-43, 65-83; 7 Tr. 10, 12, 22, 25; GXs 2-6, 8-16, 25-27, 33-37, 39-45).

2. At trial, the government elicited testimony from Norman Reese, the SMC foreman who had supervised the various interstate shipments of stolen property, to establish that each shipment had a value in excess of $5,000, as is required by 18 U.S.C. 2314. Reese correlated the weight of each shipment of stainless steel, as set forth in the invoice, with its contents (6 Tr. 66-92). He stated that one shipment could have

been "butt ends, a few small caps" (*id.* at 67), and he described the remaining shipments as butt ends, ingots, or both (*id.* at 68-92). On cross-examination, Reese described the shipments as mainly 2,000 to 4,000 pound butt ends (*id.* at 178-192). He further testified that SMC did not ship caps mixed with butt ends (*id.* at 178-179).

On the third day of jury deliberations, the jury asked a question that prompted a meeting of the parties. During an off-the-record conversation with defense counsel, the prosecutor mentioned that Reese previously had indicated that some of the shipments contained caps. Defense counsel took no action in response to that disclosure, and the jury returned its verdicts shortly thereafter. Two weeks later, on June 19, 1985, petitioners moved for a new trial under Fed. R. Crim. P. 33 on the ground that the government had failed to disclose Reese's allegedly inconsistent prior statement (86-1784 Pet. 5). See *Brady* v. *Maryland*, 373 U.S. 83 (1963). The district court denied that motion on July 23, 1985, concluding that "there is no reasonable probability that the questioned non-disclosed evidence would have affected the outcome of the trial" (Pet. App. A1).

Seventeen days later, on August 8, 1985, the court reconvened the parties and announced that it had determined, sua sponte, to reconsider its order. The court granted petitioners a new trial, apparently believing that this Court's recent decision in *United States* v. *Bagley*, 473 U.S. 667 (1985), required that result. See Pet. App. C1.[2] Thereafter, the gov-

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[2] In *Bagley*, this Court held that a prosecutor's failure to disclose *Brady* material does not require a new trial unless the evidence is material (473 U.S. at 678-679). The Court

ernment moved for reconsideration of the court's decision, arguing that the court lacked jurisdiction to order a new trial sua sponte. The district court agreed and vacated its order (Pet. App. C1-C4).

3. On appeal, petitioners argued that the government's failure to furnish them with Reese's prior statement entitled them to a new trial. They also argued that the district court erred in vacating its sua sponte order granting a new trial. The court of appeals rejected the *Brady* claim, concluding that petitioners had "failed to demonstrate either the error they seek to raise, or the materiality of, or prejudice from, the tardy disclosure" (Pet. App. D2). It noted that the prosecutor's revelation concerning Reese's prior statement was made in the course of an off-the-record conversation, which petitioners made no attempt to preserve on the record (*ibid.*). The court further observed that "no effort was made by defense counsel before the jury returned its verdict to either reopen the case, or to have the trial court declare a mistrial" (*ibid.*) The court of appeals also affirmed the district court's vacation of its sua sponte order, stating that "[t]he district court correctly comprehended its inability to grant a new trial in the absence of a motion from a defendant" (*ibid.*).

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further held that "evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different" (*id.* at 682; *id.* at 685 (White, J., concurring)).

ARGUMENT

1. Petitioners first reassert their contention that the government violated the rule of *Brady* v. *Maryland*, 373 U.S. 83 (1963), by failing promptly to inform them of a government witness's prior inconsistent statement (86-1784 Pet. 7-12; 86-1785 Pet. 8-13). The court of appeals and the district court both correctly rejected that contention.

The government has an obligation to disclose evidence "that is both favorable to the accused and 'material either to guilt or punishment' " (*United States* v. *Bagley*, 473 U.S. at 674 (quoting *Brady*, 373 U.S. at 87)). The *Brady* disclosure requirement is intended to prevent the "miscarriage of justice" that might occur if a defendant were denied access to exculpatory evidence during trial (*Bagley*, 473 U.S. at 675-676). Petitioners contend that those principles were violated in this case because the government denied them access to *Brady* material until after the jury had retired to render its verdict. But the claim of a *Brady* violation here is highly dubious. As we explain below, the allegedly exculpatory evidence was, if anything, inculpatory and had only minimal impeachment value. Indeed, petitioners themselves apparently attached little significance to Reese's prior statement when they learned of it during the trial. As the court of appeals observed (Pet. App. D2), petitioners made no effort to preserve the statement in the record, to reopen the case prior to the jury's verdict, or to seek a mistrial.[3]

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[3] The courts of appeals generally agree that "[i]f previously undisclosed evidence is disclosed during trial, no *Brady* violation occurs unless the defendant has been prejudiced by

But even if the government's nondisclosure amounted to a *Brady* violation, and even if petitioners were not obligated to raise an objection prior to the jury's verdict, the supposed violation would not justify a new trial. A *Brady* violation requires reversal of an otherwise lawful conviction only if the undisclosed information is material in the sense that "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *United States* v. *Bagley*, 473 U.S. at 682; *id.* at 685 (White, J., concurring). After reviewing the information at issue in the context of the evidence at trial, the court of appeals correctly concluded that petitioners failed to demonstrate "the materiality of, or prejudice from, the tardy disclosure" (Pet. App. D2). That largely factual determination does not warrant further review.

As we have explained, the government accused petitioners of stealing and transporting stainless steel scrap. At trial, Reese described the various shipments and made several statements suggesting, albeit ambiguously, that one shipment contained stainless steel

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the delay in disclosure." *United States* v. *Holloway*, 740 F.2d 1373, 1381 (6th Cir.), cert. denied, 469 U.S. 1021 (1984); see, *e.g.*, *United States* v. *McKinney*, 758 F.2d 1036, 1049-1050 (5th Cir. 1985); *United States* v. *Ziperstein*, 601 F.2d 281, 291 (7th Cir. 1979), cert. denied, 444 U.S. 1031 (1980). The government's disclosure of *Brady* information after the jury has retired may, in some cases, result in incurable prejudice. See *Hamric* v. *Bailey*, 386 F.2d 390 (4th Cir. 1967). But the question whether the claimed prejudice can be overcome should first be directed to the district court prior to the jury's verdict. The defendant has an obligation to raise its objection at that time, rather than to save the objection so as to preserve it for a subsequent appeal.

caps and the other shipments contained stainless steel ingot butts. Reese's lack of specificity was understandable; the actual form of the stainless steel was a technical matter of little interest to the prosecution or the defense. The supposedly exculpatory evidence —Reese's prior statement that more than one of the shipments contained caps—was likewise immaterial to the question of guilt or innocence. Indeed, the pretrial statement, if anything, was wholly consistent with the indictment and supported petitioners' guilt.[4]

Furthermore, Reese's statements had only minimal impeachment value, at best. As noted above, Reese testified at trial that one of the shipments could have included caps (6 Tr. 67). And he indicated on cross-examination that he was unsure of the exact form of the stainless steel in various shipments (*id.* at 178-193). Thus, there was little discrepancy between his trial testimony and his pretrial statement. Moreover, petitioners thoroughly challenged Reese's credibility on a number of other grounds, questioning him about his status as an immunized witness; his part in the theft of stainless steel from SMC; and other allegedly inconsistent prior statements he made concerning the weight of the scrap steel, the paperwork for the shipments, and the amount of the bribes paid to the Jones & Laughlin employees (see *id.* at 107-222). Thus, any discrepancy between Reese's trial testimony and the particular pretrial statement at issue here could

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[4] Significantly, petitioners did not seek to distinguish between ingot butts and caps at trial; instead, they defended on the ground that they had a good-faith belief that they were entitled to *all* the stainless steel pieces (1 Tr. 160, 164-165, 167, 186-187, 195-196; 11 Tr. 117, 141-144, 148-149, 158). As counsel for Gregory stated to the jury (11 Tr. 122), under the defense theory "all the counts are the same."

not have supplemented petitioners' impeachment efforts in any significant way.

Finally, the other evidence of petitioners' guilt, which included testimony from various participants in the scheme, was compelling. Given the strength of the government's case, there is no reasonable probability that, had Reese's pretrial statement been made available to petitioner earlier in the trial, the result of the proceeding would have been different. Indeed, petitioners' failure to seek a pre-verdict remedy directly undermines their present contention that the disclosure could have changed the result of the trial.[5]

2. Petitioners also contend that the district court erred in vacating its sua sponte order granting them a new trial (86-1784 Pet. 12-14; 86-1785 Pet. 13-15). The court of appeals correctly concluded that the district court acted properly in vacating that order (Pet. App. D2).

The Federal Rules of Criminal Procedure provide that the district court may grant a new trial "on motion of a defendant" (Fed. R. Crim. P. 33). The Rules "make it clear that a judge has no power to order a new trial on his own motion, that he can act only in response to a motion timely made by a defendant." Fed. R. Crim. P. 33 advisory committee note (1966 Amendment). See, *e.g.*, *United States* v. *Brown*, 587 F.2d 187, 189 (5th Cir. 1979); *United States* v.

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[5] Contrary to petitioners' suggestion, this case does not involve the solicitation of false testimony by the government. Petitioners have not shown that Reese's testimony was false, and the government took the position in the district court that Reese's sworn testimony at trial in the presence of his former employees deserved more credence than his informal, unrecorded, and unratified out-of-court statement. Government's Answer in Opposition to Defendants' Motion for New Trial at 7.

Green, 414 F.2d 1174, 1175 (D.C. Cir. 1969). Here, petitioners made a timely motion for a new trial, the district court denied it (Pet. App. A1), and petitioners did not make a motion for reconsideration following the denial. The district court's subsequent order granting a new trial (*id.* at B1-B2) was made in the absence of a defense motion and was therefore invalid. Once informed of that defect, the district court promptly vacated its order (*id.* at C1-C4), and the court of appeals properly affirmed that result (*id.* at D2). Both courts recognized that Fed. R. Crim. P. 33 unambiguously prohibits a sua sponte order granting a new trial.

Petitioners contend that the Rule 33 prohibition should not apply here because the purpose of the rule is to obviate the double jeopardy problems that would arise if trial judges could grant new trials in the absence of a defense motion (see Fed. R. Crim. P. 33 advisory committee note (1966 Amendment)) and because they clearly would have welcomed a new trial in light of their initial Rule 33 motion. But Rule 33, by its express terms, does not permit such exceptions. Rather, it was intended to serve the more general purpose of precluding unilateral judicial second-guessing of the jury's verdict. In any event, there is no clear distinction, for double jeopardy purposes, between a court's granting "reconsideration" of a new trial motion in the absence of a timely request for reconsideration and the court's granting a new trial sua sponte after previously denying a separate motion for a new trial. Acceptance of petitioner's theory would therefore create an ill-defined and unmanageable exception to a presently clear rule.[6]

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[6] Petitioners' reliance on *United States* v. *Spiegel*, 604 F.2d 961, 971 (5th Cir. 1979), cert. denied, 446 U.S. 935 (1980), is

Finally, denial of the new trial motion was clearly the correct result quite apart from the question whether the district court had jurisdiction to grant the motion in the absence of a motion by petitioner. As the court of appeals pointed out, and as we have discussed above, the pretrial statement that was withheld in this case was inconsequential, and the prosecutor's failure to disclose that statement until late in the trial could not have affected the outcome of the case. Accordingly, it would have been error for the district court to grant a new trial motion even if the district court had had jurisdiction. Any error on the part of the district court and the court of appeals with respect to the jurisdictional question therefore did not result in the denial of any relief to which petitioners were otherwise entitled.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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WILLIAM F. WELD
Assistant Attorney General

JOEL M. GERSHOWITZ
Attorney

JULY 1987

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misplaced. There, the court of appeals held that the district judge had jurisdiction to reconsider his grant of a new trial pursuant to a timely motion for reconsideration by the government (604 F.2d at 971). Thus, *Spiegel* did not involve sua sponte action by the court.

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